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No. 80-832

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CARL E. MILLER, et al., as individuals, on behalf of themselves and all persons residing in the area of Avon Township subject to annexation; CYRIL M. PELICAN, et al., as individuals and on behalf of all persons residing in the portion of Avon Township not subject to annexation; EARL BORDEN, et al., as individuals and in the capacity of members of the Avon Township Board; Avon Township Individually and all persons residing in the portion of Avon Township not subject to annexation,

Petitioners,

vs.

DAVID CALHOUN, et al., members of the STATE BOUNDARY COMMISSION AND JAMES S. HYDE,

Respondents,

and

CITY OF ROCHESTER,

Respondent.

BRIEF OF RESPONDENTS DAVID CALHOUN, ET AL, MEMBERS OF THE STATE BOUNDARY COMMISSION, AND JAMES S. HYDE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For the purpose of clarity, Respondents restate the questions presented by Petitioners as follows:

1. Does a statutory provision which permits residents of an area proposed to be annexed by a city to petition for a referendum vote on the annexation question when more than 100 people reside in such area but does not permit individuals to petition for a referendum on the annexation if 100 or fewer residents reside in the area proposed to be annexed violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does a statutory provision which permits residents of an area proposed to be annexed by a city to petition for a referendum vote on the annexation question when more than 100 people reside in such area but does not permit individuals to petition for a referendum on the annexation if 100 or fewer residents reside in the area proposed to be annexed violate the Due Process Clause of the Fifth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment to the United States Constitution?

3. Does a statutory provision which permits residents of an area proposed to be annexed by a city to petition for a referendum vote on the annexation question when more than 100 people reside in such area but does not permit individuals to petition for a referendum on the annexation if 100 or fewer residents reside in the area proposed to be annexed violate the Voting Rights Act of 1965, 42 USC § 1971 *et seq*?

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No. 80-832

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CARL E. MILLER, et al., as individuals, on behalf of themselves and all persons residing in the area of Avon Township subject to annexation; CYRIL M. PELICAN, et al., as individuals and on behalf of all persons residing in the portion of Avon Township not subject to annexation; EARL BORDEN, et al., as individuals and in the capacity of members of the Avon Township Board; Avon Township Individually and all persons residing in the portion of Avon Township not subject to annexation,

Petitioners,

vs.

DAVID CALHOUN, et al., members of the STATE BOUNDARY COMMISSION AND JAMES S. HYDE,

Respondents,

and

CITY OF ROCHESTER,

Respondent.

BRIEF OF RESPONDENTS DAVID CALHOUN, ET AL, MEMBERS OF THE STATE BOUNDARY COMMISSION, AND JAMES S. HYDE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents David Calhoun, et al, members of the State Boundary Commission, and James S. Hyde respectfully show why the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied in the above-entitled cause.

STATEMENT OF THE CASE

Respondents do not accept the argumentative conclusions set forth in the Statement of the Case made by Petitioners. Respondents accept the Statement of the Case made by Petitioners as an accurate representation of the procedural aspects of this case and as an accurate representation of the allegations made in the Complaint upon which the District Court granted Summary Judgment.

The Statement of the Case should also indicate that the stay of the annexation by the Michigan courts referred to at page 4 of Petitioners' Brief has now been dissolved. The Stay Order which prevented this annexation from taking effect was dissolved by a decision of the Michigan Court of Appeals in *Avon Township* v *State Boundary Commission*, 96 Mich App 736; 293 NW2d 691 (1980), *leave den.* —— Mich —— (November 25, 1980), and the annexation became effective when the application for leave to appeal filed by the Township of Avon with several of the individual petitioners in this case was denied on November 25, 1980, by the Michigan Supreme Court.

In discussing the timeliness in which certain federal questions were raised before this Court and the Michigan Supreme Court in *Midland Township* v *State Boundary Commission*, 401 Mich 641; 259 NW2d 326 (1977), *appeal dismissed*, 435 US 1004 (1978), at page 5 of Petitioners' Brief, it should be noted that the State Boundary Commission admitted that the federal equal protection question was raised both before the Michigan circuit court and the Michigan Supreme Court. (See the description of Proceedings Below set forth in the Motion to Dismiss or Affirm by the State Boundary Commission in the *Midland* case in the appendix to this Brief.)

ARGUMENT

I.

SECTION 9 OF THE MICHIGAN HOME RULE CITIES ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The legality of section 9 of the Michigan home rule cities act, 1909 PA 279, as amended; MCLA 117.9; MSA 5.2079, has previously been considered by this Court. Following the Michigan Supreme Court's decision in *Midland Township* v *State Boundary Commission,* 401 Mich 641; 259 NW2d 326 (1977), the townships and individuals involved in that case filed a Jurisdictional Statement with this Court raising the issue of whether section 9 of the Michigan home rule cities act, *supra,* violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. On May 1, 1978, this Court entered an order dismissing the appeal for want of a substantial federal question. *Midland Township* v *State Boundary Commission,* 435 US 1004 (1978).

In *Hicks* v *Miranda,* 422 US 332 (1975) this Court stated that a summary decision by this Court without opinion for want of a substantial federal question is a decision on the merits of the case. Accordingly, this Court's decision in *Midland Township* v *State Boundary Commission, supra,* that a substantial federal question was not presented when it was alleged that Michigan's home rule cities act violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, establishes a precedent to be followed in this case.

Petitioners assert that the *Midland* case is distinguishable from this case in that the *Midland* case was brought by town-

ships and not by voters. A review of the Briefs filed with this Court in the *Midland* case indicates that the Appellants therein consisted of both townships and individuals. Similarly, in this case, we have a township joining with individuals as Petitioners. The *Midland* case cannot be distinguished on the basis that the parties involved there had different interests or concerns than the parties in this case. The townships and the individuals involved in the *Midland* case raised the very same equal protection challenge under the Fourteenth Amendment to the United States Constitution as Petitioners are raising.

Petitioners also contend that this Court's decision in the Midland case is distinguishable for the reason that the alleged violation of the equal protection provision of the United States Constitution was not timely raised, and accordingly, not considered by this Court. Petitioners properly note that in the *Midland* appeal to this Court, at pages 21 and 22 of the Jurisdictional Statement, Appellants therein admitted that the decisions of the trial court and the Michigan Court of Appeals were based upon state constitutional grounds. However, what Petitioners failed to state in their brief is that the Jurisdictional Statement filed with this Court in the *Midland* appeal went on to disclose that the Michigan Supreme Court reversed the decision of the trial court and the Michigan Court of Appeals, and found that section 9 of the Michigan home rule cities act, *supra*, did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In the Motion to Dismiss or Affirm filed by the State Boundary Commission in the *Midland* case, it is admitted in the description of the Proceedings Below that the decision of the Michigan Supreme Court in *Midland* was based upon a finding by the Court that there had been no violation of the equal protection guarantees afforded by the Fourteenth Amendment to the United States Constitution. (See the description of Proceedings Below set forth in the Motion to

Dismiss or Affirm by the State Boundary Commission in the *Midland* case in the Appendix to this Brief). Since both the *Midland* case and this case involve alleged violations of rights secured by the Equal Protection Clause of the United States Constitution, the two cases cannot be distinguished on this basis.

Petitioners further attempt to distinguish this Court's holding in the *Midland* case by stating that it is not clear whether the Michigan Supreme Court made its decision based upon the state constitution or on the federal constitution and that unless reliance upon the federal constitution is specifically enumerated, it must be presumed that the Michigan Supreme Court based it decision on nonfederal grounds. The Michigan Supreme Court has long held that the state constitution secures the same rights of equal protection as does its counterpart in the Constitution of the United States. *Fox* v *Unemployment Security Commission*, 379 Mich 579; 153 NW2d 644 (1967). In holding that section 9 of the Michigan home rule cities act, *supra*, was not a violation of equal protection, in light of challenges to that provision of state law pursuant to both the state and the United States Constitutions, it is clear that the Michigan Supreme Court concluded that no violation of the Fourteenth Amendment of the United States Constitution existed.

Regardless of the precedential effect of this Court's decision in the *Midland* case, it is clear from other precedent that no substantial federal question has been raised in this case. This Court, in *Hunter* v *Pittsburgh*, 207 US 161 (1907), set forth the broad powers conferred upon a state to adjust municipal boundaries within such a state. In discussing the adjustment of municipal boundaries, this Court has previously found that a state is supreme in all such respects, and its legislative body, in conforming its actions to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the

United States. *Hunter* v *Pittsburgh,* Id. at 178. The Michigan Supreme Court relied upon this very language in reaching its decision in the *Midland* case. *Midland Township* v *State Boundary Commission,* 401 Mich 641, 665-666; 259 NW2d 326, 338.

Appellants argue that the *Hunter* case was misapplied by the Michigan Supreme Court is deciding *Midland* and argue that *Hunter* is inapplicable to an alleged violation of equal protection pursuant to the United States Constitution. The continued viability of the *Hunter* decision was noted by this Court in *Holt Civic Club* v *Tuscaloosa,* 439 US 60, 71 (1978), where this Court stated that while somewhat qualified, *Hunter* v *Pittsburgh* "continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority in them."

The control of the City of Tuscaloosa over residents of territory adjoining the city without granting the right to vote in *Holt Civic Club* is substantially greater than the control over the residents of townships afforded Michigan cities as a result of section 9 of the Michigan home rule cities act, *supra.* Under the statute before this Court in *Holt Civic Club,* an Alabama city can exercise continuing police power ad infinitem over property adjoining the city without affording the individuals of such territory the right to vote. The City of Tuscaloosa can make numerous decisions under this statute with respect to municipal ordinances, the licensing of businesses, and other matters, all of which affect individuals living outside the city on a daily basis without being required to allow these non-city residents to participate in the decision making process. Yet, this Court did not think that such a situation was sufficient to establish a constitutionally protected right to vote in the residents of the territory adjoining the City of Tuscaloosa.

As in *Holt Civic Club,* Plaintiffs in this case have failed to

show initially that a right to vote exists. Additionally, it should be noted in the present case that those individuals whose property has been annexed by the City of Rochester now enjoy the same voter rights as other residents of the City of Rochester. Thus, unlike the situation in *Holt Civic Club*, ongoing control by a city over adjoining territory is not granted under the Michigan home rule cities act without giving residents of the affected area the right to vote. While no right to vote on the initial question of whether the annexation should take place exists, those whose property is annexed without a vote are in a substantially better position to have a voice in the government they are regulated by than are Alabama residents living outside of major cities in Alabama.

Similar arguments to those raised by Petitioners in this case were raised before the Sixth Circuit Court of Appeals in the case of *Detroit Edison Co* v *East China Township School District No. 3*, 378 F2d 225 (CA 6, 1967), *cert den* 389 US 932 (1967). The Court, in the *Detroit Edison Co, Id.*, 378 F2d at 229, noted that reliance by Plaintiffs therein upon reapportionment cases such as *Gomillion* v *Lightfoot*, 364 US 339 (1960) was misplaced and that such cases create no constitutional rights in affected citizens concerning the procedure for creating or altering any type of state districts. The Court went on to find that equal protection and due process challenges to the annexation question in that case were without merit. Cases from other circuits to the same effect include *Hammonds* v *City of Corpus Christi*, 343 F2d 162 (CA 5, 1964) *cert den* 382 US 837 (1965), and *International Harvestor Co* v *Kansas City*, 308 F2d 35 (CA 10, 1962), *cert den* 371 US 948 (1963).

The California Supreme Court considered a similar contention to that presented here in *Weber* v *City Council of Thousand Oaks*, 109 Cal Rptr 553; 513 P2d 601 (1973). The Court in *Weber* found that no violation of equal protection

was involved since a rational basis existed for allowing the annexation of an area with less than twelve registered voters without allowing those individuals a right to vote on the annexation, even though areas with more than twelve registered voters were, by statute, given the right to vote on annexations.

The classification considered by the Court in *Weber* differs from that contained in section 9 of the Michigan home rule cities act only in the measure which is used to determine if a referendum should be held. California looks to resident registered voters in the area proposed to be annexed while Michigan looks to the total population of such area. In California, it is possible under the statute considered in *Weber* for an annexation to be allowed without a vote even though more than 100 people reside in the area proposed to be annexed. This would occur if fewer than twelve of such residents were registered voters. In Michigan, the right to petition for a referendum on the annexation exists whenever over 100 people reside in the area proposed to be annexed.

Petitioners attempt to distinguish *Weber* by arguing that a compelling state interest existed for the statutory distinction which existed in that case. However, the fact remains that the California Supreme Court did not look for the existence of a compelling state interest in upholding the legislation which was challenged in *Weber*. The Court in *Weber* required only the existence of a rational basis to uphold the classification set forth in the California statute; and in looking for the existence of a rational basis the California Supreme Court noted that such a statutory classification should only be set aside if no grounds can be conceived which justify such a classification. *Weber, supra,* 513 P2d at 608.

Equal protection challenges to annexation procedures in other states have traditionally been reviewed to determine the existence of a rational basis for a classification which allows

one group to vote on an annexation question but denies that right to another group. *City of Monticello* v *Adams*, 200 NW2d 522 (Iowa, 1972); *Adams* v *City of Colorado Springs*, 308 F Supp 1397 (D.C. Col. 1970), aff'd 399 US 901 (1970); *Thompson* v *Whitley*, 344 F Supp 480 (E.D. N.C. 1972). In each of these cases, a rational basis was found to exist.

Similarly, a rational basis exists for the classification contained in section 9 of the Michigan home rule cities act, *supra*. The Michigan Supreme Court found that such a rational basis existed when it stated as follows:

> "Some territory annexed will be sparsely populated or unpopulated while other territory will be more heavily populated. The challenged classification, responsive to that factual difference, tends to prevent venal abuses which there is reason to believe may occur if few persons (or a small group of persons) have absolute power to prevent an annexation economically advantageous to other persons or the community at large . . . ." *Midland Township* v *State Boundary Commission*, 401 Mich at 667; 259 NW2d at 339.

In the instant case, both the District Court and the Court of Appeals have concurred with this finding by the Michigan Supreme Court.

II.

SECTION 9 OF THE MICHIGAN HOME RULE CITIES ACT, AS APPLIED BY THE STATE BOUNDARY COMMISSION, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

Petitioners argue that they have been denied due process as guaranteed by the United States Constitution through the application of section 9 of the Michigan home rule cities act by the State Boundary Commission. To support this contention, Petitioners rely upon *Bodie* v *Connecticut*, 401 US 371 (1971), which struck down a Connecticut statute requiring all individuals, including indigents, to pay on the average a $60 fee for filing and service of process before an individual could seek a divorce under Connecticut law. This Court, in striking down the Connecticut statute, did so on the basis that no other available means of obtaining a divorce existed in Connecticut and that to require the payment of such fees resulted in the denial of an opportunity to be heard to those indigents who wished to obtain a divorce. Underlying this Court's decision in *Bodie* is the finding that a right exists which should be protected. The instant case is distinguishable from *Bodie* in that Petitioners have failed to establish that a right has been interferred with.

Petitioners' conclusion that the State Boundary Commission is acting to deny the right of people to vote on annexations is not logically supported by the premises of their argument. The point at which the right to vote on an annexation is triggered is statutorily set by section 9 of the Michigan home rule cities act. There is no discretion vested in the State Boundary Commission over whether an election should be provided for. If over 100 people reside in the area proposed to be annexed,

they have the right to petition for a referendum on the annexation question. The State Boundary Commission is without power or authority to order an annexation referendum under any other circumstances.

The affidavit of Dennis Gilliland, which was presented by Petitioners to the District Court in this case, shows that all annexation matters coming before the State Boundary Commission from January 1, 1978, until July 14, 1978, were initiated either by petitions filed by individuals or by resolutions of cities proposing annexations. In no instance was an annexation matter initiated by the State Boundary Commission since the Commission lacks the power to initiate an annexation proceeding. The fact that the vast majority of petitions filed with the State Boundary Commission involved areas with less than 100 citizens is not a matter within the control of the Commission.

The State Boundary Commission is required by statute to process all petitions and resolutions in the order in which they are filed and to finally dispose of a petition or resolution before taking up any other petitions or resolutions dealing with the same territory. In considering an annexation matter, the State Boundary Commission does not have unlimited discretion. The State Boundary Commission makes its decision on whether to approve a proposed annexation based upon its review of criteria set forth in section 9 of the State Boundary Commission Act; 1968 PA 191, § 9; MCLA 123.1009; MSA 5.2242(9). This annexation has been approved by the State Boundary Commission based upon existing statutory criteria and the decision of the State Boundary Commission has been reviewed by the courts of the State of Michigan and found to be supported by competent, material and substantial evidence on the record. *Avon Township* v *State Boundary Commission, supra,* 96 Mich App 736; 293 NW2d 691 (1980), *leave den.,* —— Mich —— (November 25, 1980).

Petitioners have failed to establish that they have a fundamental right to vote and, therefore, have failed to establish a denial of due process by any claimed interference with such right. There can be no violation of due process where Petitioners have failed to show that a protected right has been interferred with.

III.

SECTION 9 OF THE MICHIGAN HOME RULE CITIES ACT DOES NOT VIOLATE THE VOTING RIGHTS ACT OF 1965.

Petitioners contend that a provision of the Voting Rights Act of 1965, 42 USC § 1971(a) is not limited to racial standards but applies to any form of discrimination. To support this position, Petitioners rely principally upon *Frazier* v *Callicutt,* 383 F Supp 15 (ND Miss 1974). While the Court in *Frazier* stated that this statutory provision applied in nonracial as well as racial discrimination matters, the Court went on to note that the class being discriminated against, students, was made up of predominantly black individuals.

This Court has not previously determined whether the provisions of 42 USC § 1971 apply where the alleged discrimination is on some nonracial ground. However, in *Mobile* v *Bolden,* 456 US 55 (1980), this Court determined that the statutory language of 42 USC § 1973 which is very similar to the language contained in 42 USC § 1971(a)(1) prohibits only a purposeful discriminatory denial or abridgement by government of the freedom to vote on account of race, color, or previous condition of servitude.

Petitioners argue that 42 USC § 1971(a)(1) and 42 USC § 1971(a)(2) operate independently of each other. However, such an interpretation of 42 USC § 1971(a)(2) would render

42 USC § 1971(a)(1) meaningless, since any protection afforded by the latter provision would also be afforded by the former. The language of 42 USC § 1971(a) should be read in its entirety to determine the proper application of its provisions. Since Petitioners have failed to show any purposeful discrimination and have not alleged any discrimination on the basis of race, color, or previous condition of servitude, the provisions of 42 USC § 1971 are not applicable to the instant case.

Even if the provisions of 42 USC 1971 were held applicable to cases alleging nonracial discrimination, it is clear that the language of this provision is meant to protect the rights of an individual to vote in an election which is actually to be held. No provision of this statute requires a state or any territorial subdivision of a state to hold an election which is not otherwise provided for by law. In the case at hand, there is no election on the question on which Petitioners wish to vote; and no election is required to be called as the cases amply demonstrate.

The California Supreme Court considered an argument similar to that being advanced by Petitioners in *Weber* v *City Council of Thousand Oaks, supra,* and found that existing voting rights cases were distinguishable on the ground that it was necessary to show that an identifiable class of electors was being excluded from an election. In reaching this decision the Court stated as follows:

> ". . . *In the instant case no issue of the exclusion of a class from participation in an election is raised;* the issue instead is whether the inclusion or exclusion of any election as part of an annexation proceeding can justifiably be made to depend on the number of resident registered voters." *Weber, supra,* 513 P2d at 607. [Emphasis supplied.]

This is not a case in which an existing right to vote has been impaired or otherwise violated. Rather, it is an attemppt by the Petitioners to indirectly challenge the authority of the State Boundary Commission to approve annexations in the State of Michigan. The individual members of the State Boundary Commission have statutory guidelines to follow in considering all annexation matters; and as noted by the District Court, the proper forum to complain that the State Boundary Commission is not statutorily performing its function is in the state courts. (Opinion of District Court, Appendix p. 6a.)

CONCLUSION

No violation of a right to vote has been shown and no substantial federal question has been presented by Petitioners in this case. Petitioners have not shown the existence of considerations pursuant to Supreme Court Rule 17 that would warrant review on Writ of Certiorari in this case. For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: January 9, 1981

APPENDIX

Excerpt from Motion to Dismiss or Affirm in
Township of Midland v *Michigan State Boundary Commission*,
435 US 1004 (1978)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1285

TOWNSHIP OF MIDLAND, a Municipal Corporation in Midland County, Michigan and ROBERT B. CHATTERTON,

Appellants,

v

MICHIGAN STATE BOUNDARY COMMISSION,

Appellee,

and

CITY OF MIDLAND, a Municipal Corporation,

Intervening Defendant-Appellee,

et al

MOTION TO DISMISS OR AFFIRM

B. The Proceedings Below

The State Boundary Commission, acting upon various resolutions adopted by city councils proposing annexations of territory, did approve annexations of territories to the City of Midland, the City of Brighton, and the City of Novi. In each case, less than 100 persons resided in the area proposed to be annexed. The respective townships commenced action in the Circuit Court for the County of Ingham attacking the proposed annexations and raising numerous questions relating to alleged violations of state law, the state constitution, and the instant federal constitutional question. The cases were consolidated during the appeal process. The Michigan Supreme

Court unanimously upheld the authority of the State Boundary Commission and found that the contentions of the townships pertaining to alleged violation of the Federal Constitution, state constitution, and state law were without merit. Specifically, the Michigan Supreme Court, after careful examination of federal case law, concluded that there had been no violation of the equal protection guarantees afforded by the Fourteenth Amendment to the United States Constitution and stated:

> "We are of the opinion that the challenged classification bears a substantial relation to the object of the legislation: providing a means appropriate to the resolution of disagreements concerning annexation of territory to a city." *Midland Township* v *Boundary Commission*, 401 Mich 641, 666-667; 259 NW2d 326, 338-339 (1977).

It is from that final decision of the Michigan Supreme Court that the Appellants have filed the instant appeal.